IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-6942

ENSIO RUBEN LAKESIDE, Petitioner

v.

STATE OF OREGON, Respondent

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF OREGON

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PETITION FOR WRIT OF CERTIORARI

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No. _____

ENSIO RUBEN LAKESIDE, Petitioner

v.

STATE OF OREGON, Respondent

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF OREGON

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon which was made and entered in the above cause, on March 17, 1977. A petition for rehearing was filed with the Oregon Supreme Court and this petition for rehearing was denied on April 12, 1977.

CITATIONS TO OPINIONS BELOW

Petitioner was charged with Escape in the Second Degree, ORS 162.155. Petitioner was found guilty by a jury and was sentenced on October 1, 1975. Petitioner appealed the judgment of the trial court to the Oregon Court of Appeals.

The Oregon Court of Appeals reversed petitioner's conviction in State of Oregon v. Ensio Ruben Lakeside, 25 Or App 539,

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549 P2d. 1287 (1976). The State of Oregon petitioned the Oregon Supreme Court for review of the opinion of the Court of Appeals and review was granted.

The Oregon Supreme Court reinstated petitioner's conviction and reversed the decision of the Oregon Court of Appeals, with one Justice dissenting in State of Oregon v. Ensio Ruben Lakeside, 277 Or 569, P2d. (1977).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTION PRESENTED

Is it a violation of the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution and a violation of a defendant's Right to Counsel, guaranteed by the Sixth Amendment to the United States Constitution, for the trial court to comment on a defendant's failure to testify, by giving a jury instruction concerning this fact, after a defendant has made a timely objection to the giving of this instruction prior to the charge to the jury?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved in this petition are the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

> Amendment V. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand

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Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment XIV. "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws..."

STATEMENT OF FACTS

Petitioner was charged with Escape in the Second Degree, ORS 162.155. On September 25 and 26, 1975, petitioner stood trial. Petitioner did not take the stand during his trial. As part of his trial strategy, petitioner's counsel was careful to avoid any mention of the fact that petitioner would not take the witness stand. Petitioner's counsel made no mention of this fact in Voir Dire or opening and closing argument.

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Prior to instructing the jury, the trial court met with counsel in chambers. At that time, the trial court informed counsel that it intended to give the following instruction:

> "Under the laws of this State, a defendant has the option to take the witness stand to testify in his or her behalf. If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption against the defendant, and this must not be considered by you in determining the question of guilt or innocence."

Petitioner's counsel informed the court that he did not want this instruction to be given. He stated that giving the instruction was like "waving a red flag in front of the jury". The trial court gave the instruction over petitioner's timely objection. Petitioner took exception to the giving of the instruction.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE ISSUED

I.

The importance of the issues raised outside of the facts of the specific case.

The specific issue raised in this petition is very narrow and it is whether or not it is reversible error for a trial judge to instruct a jury concerning the failure of a defendant to testify, when defense counsel has objected to the giving of this instruction prior to the giving of the instruction.

This is not a case where no objection is made prior to the giving of the "failure to testify" instruction, and the court

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gives such an instruction sua sponte. This is not a case where the court gives such an instruction sua sponte and objection is made after the instruction is given. This is not a case where one co-defendant asks for the instruction and the other co-defendant objects.

The specific issue raised in this petition has been litigated in many state and federal jurisdictions and there is a split of authority in both the state and federal jurisdictions on this issue. Several state and federal courts have held, either directly or in dicta, that it is error for a court to instruct a jury concerning the failure of a defendant to testify when defense counsel has made a timely objection to the giving of the instruction: State cases - People v. Molano, 253 Cal App 2d 841, 61 Cal Rptr 821 (1967); Russel v. State, 240 Ark 97, 398 SW 2d 213 (1966); Villines v. State, 492 P2d 343 (Okla Ct of Crim Appeals, 1971); Gross v. State, 306 NE2d 371 (Ind. Supp., 1974); People v. Horrigan, 253 Cal App 2d 519, 61 Cal Rptr 403 (1967); State v. White, 285 A2d 832 (Me, 1972); State v. Kimball, 176 NW2d 864 (Iowa, 1970), Federal cases - U.S. v. Smith, 392 F2d. 302 (CA4, 1968); Mengarelli v. U.S. Marshall, 476 F2d. 617 (CA 9, 1973).

Several state and federal courts have held that it is not error for a court to instruct a jury concerning the failure of a defendant to testify even though defense counsel has made a timely objection to the giving of the instruction: State cases - State v. Goldstein, 65 Wash. 2d 901, 400 P2d. 368 (1965), cert den

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382 U.S. 895 (1965); Pearson v. State, 28 Md. App. 196, 343 A2d. 916 (1975); Rogers v. State, 486 SW2d. 786 (Tex Cr App 1972); Harvey v. State, 187 So 2d 59 (Fla App 1966), cert den 386 U.S. 923 (1967); State v. Baxter, 51 Haw 57, 454 P2d. 366 (1969), cert den 397 U.S. 955 (1970). Federal cases - United States v. Schwartz, 398 F2d. 464 (CA 7, 1968), cert den 393 U.S. 1062 (1969); United States v. McGann, 431 F2d 1104 (CA 5, 1970); United States v. Rimanich, 422 F2d 817 (CA 7 1970).

When the Oregon Supreme Court decided the case at bar it pointed out that it had to decide whether the giving of the instruction over prior objection was an invasion of constitutional rights "without help from the one source which could put the issue to rest; namely, the United States Supreme Court." State v. Lakeside, supra., 277 Or. at 587. Since this issue arises from time to time in both the state and federal jurisdictions, it would be helpful if this court would put the issue to rest by accepting review of this case.

II.

Why giving the "failure to testify" instruction over objection of defense counsel violates the Fifth Amendment to the United States Constitution,

In Griffin v. California, 380 U.S. 609 (1965), the defendant did not testify at his trial. The prosecutor commented to the jury on the failure of the defendant to testify. The trial court instructed the jury that the defendant had a constitutional right not to testify but went on to say that the jury could consider

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this failure to testify as evidence bearing on the question of whether or not he was guilty of the crime charged. This court held that the Fifth Amendment forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.

In People v. Molano, 253 Cal App 2d. 841, 61 Cal Rptr 821 (1967) an instruction identical in content to the instruction given in the case at bar was given over objection of defense counsel. The California Court of Appeals, Second District, Division Four held that:

> "Since Griffin v. State of California, (Apr. 1965) 380 US 609, 85 S Ct 1229, 14 L Ed 2d 106, either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt, are forbidden. Defendant contends, and we believe correctly so, that to give this instruction when he did not want it to be given, was tantamount to making a 'comment' proscribed by Griffin. The argument being that such an instruction highlights and emphasizes the fact that the accused did not take the stand.
>
> "Particularly apt here, we believe, is the comment of Mr. Justice Douglas in his dissenting opinion in United States v. Gainey, (Mar. 1965) 380 US 63, 73 ...
>
> 'Just as it is improper for counsel to argue from the defendant's silence, so is it improper for the trial judge to call attention to the fact of defendant's silence. Indeed, under 18 U.S.C. Section 3481, the defendant is entitled as a matter of right to have the trial judge expressly tell the jury that it must not attach any importance to the defendant's failure to testify; or if the defendant sees fit, he may choose to have no mention made of his silence by anyone. Bruno v. United States, 308 US 287, 60 S Ct 198, 84 L Ed 257' [Emphasis added]" Id. 61 Cal Rptr at 824-825.

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Although, as discussed below in part IV, it is often necessary to have the "failure to testify" instruction given to protect a defendant's rights, under certain circumstances, the giving of the instruction constitutes a "comment" on the failure of the defendant to testify and is as detrimental to a defendant's position as an illegal comment by the prosecutor about this fact.

III.

Why the giving of the "failure to testify" instruction, over objection, violates the Sixth Amendment to the United States Constitution.

In United States v. Ash, 413 U.S. 305, (1973) this court discussed the historical background of the Sixth Amendment:

> "A concern of more lasting importance was the recognition and awareness that an unaided layman had little skill in arguing the law or coping with an intricate procedural system. The function of counsel as a guide to complex legal technicalities long has been recognized by this Court. Mr. Justice Sutherland's well known observations in Powell bear repeating here:
>
> > 'Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge or evidence that is irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against

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him. Without it, though he be not guilty he faces the danger of conviction because he does not know how to establish his innocence.' 287 U.S., at 69, 53 S. Ct., at 64.

"The Court frequently has interpreted the Sixth Amendment to assure that the 'guiding hand of counsel' is available to those in need of it's assistance . . . " Id., 413 U.S. at 307-308.

Later on the Court stated that:

". . . Mr. Justice Balck, writing for the Court in Johnson v. Zerbst, 304 U.S. 458, 462-463, 58 S. Ct. 1019, 1022, 82 L Ed 1461 (1938), spoke of this equalizing effect of the Sixth Amendment's counsel guarantee:

'It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel'

"This historical background suggests that the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." Id., 413 U.S. at 309.

Petitioner is indigent and had to have an attorney appointed to represent him so that he, a layman, might have the benefit of the advice of someone trained in the law at his trial. Petitioner's counsel decided that it would be adverse to petitioner's interests to have petitioner testify at his trial. As part of his trial strategy, petitioner made no mention of this fact during voir dire or opening and closing arguments. Petitioner's counsel made no comment on the petitioner's failure

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to testify because petitioner's counsel did not want to highlight this point. When the trial court gave the objected to instruction, it called attention to the fact that petitioner did not testify and destroyed all the possible benefit that might have inured to petitioner because of the trial strategy. Additionally, had petitioner's counsel known that the trial court was going to give the "failure to testify" instruction, petitioner's counsel might have changed his strategy and voir dired the jury on the effect that not having the petitioner testify might have on each individual juror.

The Sixth Amendment guarantees a defendant the right to have counsel to advise him at his trial. One of the functions of an attorney is to plan a trial strategy. The selection of witnesses, the content of voir dire, the content of direct and cross examination and the content of opening and closing arguments are often dictated by the trial strategy. Obviously, a judge has a duty to interfere with a trial strategy that violates, for instance, the rules of evidence. If petitioner's counsel, as part of his trial strategy, had sought to introduce inadmissible hearsay evidence, the court would have to interfere with the trial strategy by keeping such evidence out of the trial. However, under the specific facts in the case at bar, there was no rule of law which mandated the giving of the instruction. It makes a mockery of the Sixth Amendment to hold that a defendant has a right to counsel, but then permit a judge to overrule the advice that that counsel gives to a defendant, when there is no legal basis for interfering.

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IV.

Since it is reversible error for a trial court to refuse to give the "failure to testify" instruction when requested by defense counsel, how can it be reversible error for the court to give such an instruction?

Under federal law, Bruno v. United States, 308 US 287 (1959), and the law of the State of Oregon, State v. Hale, 22 Or App 144, 537 P2d 1173 (1975), a defendant has an absolute right to have the "failure to testify" instruction given. The argument is frequently made that if it is reversible error for a trial court to refuse to give this instruction, it can not be reversible error to give the instruction. In State v. Baxter, supra., 454 P2d at 367, the Hawaii Supreme Court stated that:

> "We can not see how an identical instruction will affect a jury differently by the fact that, unbeknown to it, in one case there was an objection and in the other there was not..."

The wording of the "failure to testify" instruction is not at issue here. What is at issue is the giving of the instruction at all.

Under certain circumstances, it is advantageous to have the trial court instruct the jury concerning the defendant's failure to testify. If the defendant can not take the stand for some reason and there is evidence in the trial that can only be explained by the defendant, then defense counsel would want to have a "failure to testify" instruction given to the jury in hopes that they will not hold the defendant's failure to testify against him.

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Under other circumstances, it is extremely disadvantageous to have a "failure to testify" instruction given. Suppose that defendant puts on an alibi defense and produces several witnesses who testify that the defendant was at some place other than the scene of the crime at the time that the crime was committed. Furthermore, assume that the defendant has a lengthy criminal record, including convictions for the crime charged, and makes a bad appearance on the stand. Since the defendant would add nothing to the testimony of the alibi witnesses and would injure his cause by taking the stand, trial strategy would dictate that defense counsel not put defendant on the stand and try to call as little attention as possible to the defendant's failure to take the stand. If the defendant's witnesses supply all of the information that the defendant would supply had he taken the stand, the jury will probably not think too much of the defendant's failure to take the stand. Under such circumstances, defense counsel would not want to have the failure of the defendant to take the stand highlighted by the giving of an instruction concerning this fact.

The giving of an identically worded "failure to testify" instruction can be harmful or helpful depending on the facts of the individual case. Defense counsel, if competent, is the best person to determine when the failure to testify instruction should be given. If defense counsel determines that the giving of the instruction will be detrimental to his client, it is a violation of both the Fifth and Sixth Amendments to the United

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States Constitution for a trial judge to give that instruction over objection.

CONCLUSION

For the foregoing reasons, petitioner prays that a Writ of Certiorari issued to review the judgment rendered by the Oregon Supreme Court in this case.

Respectfully submitted,

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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6942

ENSIO RUBEN LAKESIDE, PETITIONER

v.

OREGON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

PETITION FOR CERTIORARI FILED JUNE 17, 1977
CERTIORARI GRANTED OCTOBER 11, 1977

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June 24, 1975—Arraignment and Plea.

October 1, 1975—Judgment of Court.

June 1, 1976—Opinion of the Oregon Court of Appeals

March 17, 1977—Opinion of the Oregon Supreme Court.

April 12, 1977—Letter of Oregon Supreme Court denying Petition for Rehearing.

October 11, 1977—Order of United States Supreme Court granting Petition for Writ of Certiorari.

[2] In the Circuit Court of the State of Oregon for the County of Multnomah

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No. C 75-06-1977 CR

THE STATE OF OREGON, PLAINTIFF

v.

ENSIO RUBEN LAKESIDE, DEFENDANT

Indictment

Filed June 20, 1975

The above named defendant is accused by the Grand Jury of Multnomah County, State of Oregon, by this Indictment of the crime of ESCAPE IN THE SECOND DEGREE committed as follows:

The said defendant, on or about June 17, 1975, in the County of Multnomah, State of Oregon, did unlawfully and knowingly escape from the Multnomah County Correctional Institution, a correctional facility, contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated June 20, 1975, at the City of Portland, in the County aforesaid.

* * * * *

[3] PERTINENT PORTIONS OF THE TRIAL RECORD

THE INSTRUCTION

The COURT. Now, then, ladies and gentlemen of the jury, you have heard all of the evidence in this case, and you have heard the statements of counsel. It now becomes my duty to instruct you with reference to the principles of law applicable to the case * * * [Tr. 221]

* * * * *

Under the laws of this State a defendant has the option to take the witness stand to testify in his or her own behalf. If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption against the defendant, and this must not be considered by you in determining the question of guilt or innocence. [Tr. 231]

THE EXCEPTION

The COURT. * * *

Does the defendant have any further exceptions?

Mr. MARGOLIN. Yes, I have one exception.

I made this in Chambers prior to the closing statement. I told the Court that I did not want an instruction to the effect that the defendant doesn't have to take the stand, because I felt that that's like waving a red flag in front of a jury, so I do have an exception to the instruction given to the effect that the defendant doesn't have to take the stand, and that that should not be considered against him.

The COURT. The defendant did orally request the Court just prior to instructing that the Court not give the [4] usual instruction to the effect that there are no inferences to be drawn against the defendant for failing to take the stand in his own behalf.

The Court felt that it was necessary to give that instruction in order to properly protect the defendant, and therefore, the defendant may have his exception. [Tr. 235]

[5] JUDGMENT AND ORDER

In the Circuit Court of the State of Oregon for the County of Multnomah

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STATE OF OREGON, PLAINTIFF

v.

ENSIO RUBEN LAKESIDE, DEFENDANT

No. C 75-07-1977 CR

Judgment

On October 1, 1975, this matter came before the Court, plaintiff appearing by John D. Bradley, Deputy District Attorney, and the above-named defendant appearing in person and with his attorney, Phillip M. Margolin.

IT IS ADJUDGED that the said defendant has been convicted on his plea Not Guilty and verdict of GUILTY of the offense of ESCAPE IN THE SECOND DEGREE, and this being the time for imposition of sentence, and no reason appearing to the Court why sentence should not be pronounced at this time,

IT IS FURTHER ADJUDGED that said defendant be imprisoned in a correctional facility of the State of Oregon for an indeterminate period of time, the maximum term of which shall be and hereby is fixed at Two (2) Years, said sentence to run consecutively to the sentences he is presently serving in the Multnomah County Jail, and said defendant is hereby committed to the legal and physical custody of the Corrections Division of the State of Oregon.

[6] IT IS ORDERED that any security amount heretofore posted herein by said defendant is exonerated.

[7] In the Court of Appeals of the State of Oregon

STATE OF OREGON, RESPONDENT

v.

ENSIO RUBEN LAKESIDE, APPELLANT

Opinion

Filed June 1, 1976

LEE, J., Defendant appeals his conviction of escape in the second degree, ORS 162.155.[1]

At trial defendant raised the defense of lack of criminal responsbility per ORS 161.295.[2] Contrary to the [8] wishes of defendant, the trial court instructed the jury that:

> Under the laws of this State, a defendant has the option to take the witness stand to testify in his or her own behalf. If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption against the defendant, and this must not be considered by you in determining the question of guilt or innocence.

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[1] ORS 162.155 provides:

"(1) A person commits the crime of escape in the second degree if:

"(a) He uses or threatens to use physical force escaping from custody; or

"(b) Have been convicted or found guilty of a felony, he escapes from custody imposed as a result thereof, or

"(c) He escapes from a correctional facility.

"(2) Escape in the second degree is a Class C Felony."

[2] ORS 161.295 provides:

"(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

"(2) As used in chapter 743, Oregon Laws 1971, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct."

Defendant took timely objection to the giving of that instruction. Defendant maintains that, while he has a right to such an instruction if requested, it should not be given against his will. We agree.

If a defendant requests such an instruction, it must be given. *State* v. *Hale,* 75 Adv Sh 2623, 22 Or App 144, 537 P2d 1173 (1975). The state insists that "if reversible error can occur from failure to give the instruction, the converse situation of giving the instruction over defendant's objection can hardly be error." The defendant, however, insists that giving the instruction over his objection unjustifiably interfered with his trial strategy, i.e., to avoid mention of his failure to testify.

The appellate courts of this state have not ruled on the proprietary of giving such an instruction over the defendant's objection. We are persuaded, however, by the court's reasoning in *Russell* v. *State,* 240 Ark 97, 100, 398 SW2d 213 (1966), in which a unanimous court stated that

> * * * the instruction ought not to be given against the wishes of the defendant. If the accused is to have the unfettered right to testify or not to testify he should have a correlative right to say whether or not his silence should be singled out for the jury's attention.

[9] Other jurisdictions have reached the same conclusion. *Gross* v. *State,* 261 Ind 489, 306 NE2d 371 (1974); *Villines* v. *State,* 492 P2d 343 (Okla 1971); *People* v. *Molano,* 253 Cal App2d 841, 61 Cal Rptr 821, 18 ALR3d 132 (1967). While there are also holdings to the contrary, *United States* v. *Williams,* 521 F2d 950 (DC Cir 1975), *United States* v. *Rimanich,* 422 F2d 817 (7th Cir 1970), and *United States* v. *Schwartz,* 398 F2d 464 (7th Cir 1968), *cert den* 393 US 1062 (1969), we think that the better rule is to not give instructions ostensibly designed for defendant's benefit over the knowledgeable objection of competent defense counsel.

Such a rule allows defense counsel full latitude on matters of trial strategy. We find no persuasive reason against the rule we now adopt.

Reversed and remanded for new trial.

[10] In The Supreme Court of The State of Oregon

IN BANC

STATE OF OREGON, PETITIONER

v.

ENSIO RUBEN LAKESIDE, RESPONDENT

LENT, J., Defendant was convicted by a jury of the crime of escape in the second degree and sentenced to the penitentiary. The Court of Appeals reversed and remanded for a new trial, holding that the trial court erred in instructing the jury, over defendant's prior objection, that: "Under the laws of this State a defendant has the option to take the witness stand to testify in his or her own behalf. If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption against the defendant, and this must not be considered by you in determining the question of guilt or innocence." *State* v. *Lakeside*, 25 Or App 539, 549 P2d 1287 (1976). We granted review.

Defendant assigned error as follows:

> It was error, and a violation of the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution, for the trial court to comment on appellant's failure to testify, by giving a jury instruction concerning this fact, after appellant objected to the giving of this instruction.[1]

[11] Defendant and his counsel chose not to have defendant testify, and during trial defendant's lawyer was careful to avoid any mention of the fact that defendant did not testify and had

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[1] Defendant's exception to this instruction was as follows:

"Does the defendant have any further exceptions?

"Mr. MARGOLIN. Yes, I have one exception.

"I made this in Chambers prior to the closing statement. I told the Court that I did not want an instruction to the effect that the defendant doesn't

(Continued)

not testified. The prosecuting attorney, of course, was foreclosed from mentioning the fact in any way. *See, Griffin* v. *California*, 380 US 609 (1965).

A brief review of *Griffin, supra*, would be helpful in according that decision proper perspective. In that case, defendant did not testify. To use the words of the decision which are by no means an exaggeration, "[t]he prosecutor made much of the failure" of defendant to testify. The trial court instructed the jury that the defendant had a constitutional right not to testify but went on to tell the jury:

> As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. (380 US at 610)

The trial court in substance added that no such inference could be drawn as to evidence respecting which defendant had no knowledge and further stated that failure of a defendant to deny or explain [12] the evidence of which he had knowledge did not create a presumption of guilt nor by itself warrant an inference of guilt nor relieve the prosecution of any of

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(Continued)
have to take the stand, because I felt that that's like waving a red flag in front of the jury, so I do have an exception to the instruction given to the effect that the defendant doesn't have to take the stand, and that that should not be considered against him.

"The Court. The defendant did orally request the Court just prior to instructing that the Court not give the usual instruction to the effect that there are no inferences to be drawn against the defendant for failing to take the stand in his own behalf.

"The Court felt that it was necessary to give that instruction in order to properly protect the defendant, and, therefore, the defendant may have his exception."

We shall, for the purposes of this opinion, consider this exception sufficient to preserve defendants claim of error.

its burden of proof.[2] The United States Supreme Court granted certiorari:

> to consider whether comment on the failure to testify violated the Self-Incrimination Clause of the Fifth Amendment which we made applicable to the States by the Fourteenth in *Malloy* v. *Hogan*, 378 U.S. 1, decided after the Supreme Court of California had affirmed the present conviction. (380 US at 611).

The court held that the Fifth Amendment forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.

Because many of the cases reviewed direct our attention to the decision in *Bruno* v. *United States*, 308 US 287 (1939), it would be helpful background to briefly review that case. There the court refused defendant's requested instruction substantially the same as given in the case at bar. The question in *Bruno* was whether the defendant "had the indefeasible right to have the jury told" what, in substance, defendant here complains was told to the jury. It should be kept in mind that *Bruno* was concerned not with any constitutional question but only with the effect of a Federal statute which provided that the defendant in a criminal trial might at his own request be a competent witness, but that his failure to exercise that privilege did not create any presumption against him. Interestingly enough, the government argued that [13] there was no error, because the jury would, despite such an instruction, draw an adverse inference from the defendant's failure to testify and, therefore, *a fortiori*, the jury would be more inclined to draw an adverse inference if it is reminded by an instruction that he may testify. Holding that the defendant had an absolute right to have the jury so instructed under the statute, the court answered the prosecutor's argument by saying:

> To the suggestion that it benefits a defendant who fails to take the stand not to have the attention of the jury directed to that fact, it suffices to say that, however difficult it may be to exercise enlightened self-interest,

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[2] Article I, § 13, of the California Constitution provided in part:

"• • • in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury."

> the accused should be allowed to make his own choice when an Act of Congress authorizes him to choose. And when it is urged that it is a psychological impossibility not to have a presumption arise in the minds of jurors against an accused who fails to testify, the short answer is that Congress legislated on a contrary assumption and not without support in experience. It was for Congress to decide whether what it deemed legally significant was psychologically futile. Certainly, despite the vast accumulation of psychological data, we have not yet attained that certitude about the human mind which would justify us in disregarding the will of Congress by a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court that the failure of an accused to be a witness in his own cause "shall not create any presumption against him."
> (308 US at 2940.)

In our case there is nothing in the opinion of the Court of Appeals to indicate either that defendant was asserting Fifth and Fourteenth Amendment rights or that the Court of Appeals treated this on a constitutional level.

It appears the *ratio decidendi* of the Court of Appeals opinion was that although the defendant has an absolute right to have such an instruction given under *State* v. *Hale,* 22 Or App 144, 537 P2d 1173 (1975), and *State* v. *Patton,* 208 Or 610, 303 P2d 513 (1956), the giving of the instruction over his objection unjustifiably [14] interfered with his trial strategy to avoid any mention of his failure to testify. The Court of Appeals relied primarily upon the "court's reasoning" in *Russell* v. *State,* 240 Ark 97, 398 SW2d 213 (1966), quoting therefrom as follows:

> * * * the instruction ought not to be given against the wishes of the defendant. If the accused is to have the unfettered right to testify or not to testify he should have a correlative right to say whether or not his silence should be singled out for the jury's attention.
> (398 SW2d at 215).

The Oregon Court went on to adopt "a rule" that such an instruction not be given against defendant's wishes, because

such a rule allows defense counsel full latitude on matters of trial strategy, stating in part as follows:

> * * * we think that the better rule is to not give instructions ostensibly designed for defendant's benefit over the knowledgeable objection of competent defense counsel.
> (25 Or App at 542).[3]

We have never had occasion to consider the question now before us. It has been considered by many other courts, however, and a review of the opinions of others will be of assistance in understanding our conclusions.

Russell v. *State* fails to advance the constitutional claims asserted here. In *Russell* the court cited no authority whatsoever for the material quoted by the Court of Appeals. If the Arkansas court were relying upon either its own constitution or the Fifth Amendment to the United States Constitution, as defendant urges in the case at bar, there would be some indication of that in the [15] opinion.[4]

The Court of Appeals found that *Gross* v. *State*, 261 Ind 489, 306 NE2d 371 (1974); *Villines* v. *State*, 492 P2d 343 (Okl. Crim. App.); and *People* v. *Molano*, 253 Cal App2d 841, 61 Cal Rptr 821, is ALR3d 1328 (1967); had reached the same conclusion as *Russell, supra*, but acknowledged there were holdings to the contrary, citing *United States* v. *Williams*, 521 F2d 950 (DC Cir 1975), *United States* v. *Rimanich*, 422 P2d

[3] We note in passing that this language raises certain questions which may create more problems than it purports to solve. For example, what is a "knowledgeable objection"? At what stage of the proceedings or by what procedure is it established that defense counsel is "competent defense counsel"? We do not believe such questions to be wholly frivolous.

[4] The Arkansas court noted that two of its earlier decisions on the same issue were in direct conflict, citing *Watson* v. *State*, 159 Ark 628, 252 SW 582 (1923), and *Thompson* v. *State*, 205 Ark 1040, 172 SW2d 234 (1943). In *Watson*, the opinion is silent as to the basis of defendant's claim of error. The court did hold that the giving of the instruction over defendant's objection was erroneous, because it "was abstract" and prejudicial because it "necessarily" called the jury's attention to the fact that defendant failed to testify in his own behalf "although such right was accorded to him by law." The court cited no authority whatsoever for its holding. In *Thompson* the defendant had neither requested nor made prior objection to the instruction. Again, the opinion gives no hint as to the basis of defendant's claim of error. The court held no error was committed, without any mention of *Watson* v. *State, supra*, probably for the very good reason that the cases are *not* in conflict as *Russell* v. *State* declared them to be.

817 (7th Cir 1970), and *United States* v. *Schwartz*, 398 F2d 464 (7th Cir 1968), *cert den* 393 US 1062 (1969).

In *Gross, supra*, the Indiana court noted there was no definitive holding by the United States Supreme Court on the issue and that other jurisdictions which had considered the matter were about evenly divided, citing 18 ALR3d 1335. The Indiana court held that although it was unpersuaded that "the narrow holding" of *Griffin, supra*, was applicable, the giving of the complained-of instruction over defendant's prior objection was constitutionally prohibited by the Fifth Amendment. In weighing the effect which we accord to *Gross*, we draw attention to the exact words of the instruction for comparison with that given in the case at bar:

> The defendant in this case has not taken the witness stand as a witness. Upon this question I instruct the jury that the *statute of our State* [their emphasis] reads as follows:
>
> The defendant is a competent witness to testify in his [16] own behalf. "But if the defendant does not testify, his failure to do so shall not be commented upon or referred to in the argument of the cause, nor commented upon, referred to, or in any manner considered by the jury trying the same; and it shall be the duty of the court in such case, in its charge, to instruct the jury as to their duty under the provisions of this section." (306 NE2d at 371).

To thus read the statutory language to the jury strikes us as calculated to produce in the minds of the jurors the exact opposite effect that the statute seeks to accomplish. We believe that instruction to be like "waving a red flag."

In *Villines* v. *State, supra*, the court reversed the trial judge for giving such an instruction over defendant's timely objection. No constitutional issue seems to have been raised, and, in certainty, the court did not discuss the issue as being of constitutional significance.[5]

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[5] The apparent basis for the *Villines* decision is language taken from an earlier case: *Brannin* v. *State*, 375 P2d 276 (Okl.Crim.App.1962). In *Brannin*, the defendant had failed to make timely objection. Nevertheless, the court took the opportunity to "condemn the giving of such instruction" and to call to the attention of the trial courts of the state that condemnation. *Brannin* relied upon a much earlier acse: *Russell* v. *State*, 17 Okl Cr 164, 194 P 242

(Continued)

In *Molano, supra,* the defendant made timely objection, and that court correctly interpreted *Griffin, supra,* to hold "* * * either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt, are forbidden." 253 Cal App2d at 847, 61 Cal Rptr at 824. The *Molano* court then leaps to the conclusion that the *instruction* by the court is a *comment* proscribed by *Griffin.* The court, in support of this leap, found "particularly apt" a portion of a *dissenting opinion* by Justice Douglas in *United States* v. *Gainey,* 380 US 63 at 73, which reads:

> Just as it is improper for counsel to argue from the defendant's silence, so it is improper for the trial judge to call attention to the fact of defendant's silence. Indeed, under 18 U.S.C. § 3481 the defendant is entitled as a matter of right to have the trial judge expressly tell the jury that it must not attach any importance to the defendant's failure to testify; or, if the defendant sees fit, he may choose to have no mention made of his silence by anyone. *Bruno* v. *United States,* 308 U.S. 287.[6]

We do not read *Bruno* to support the last clause of the matter quoted from Justice Douglas' dissent and relied upon by the *Molano* court. It is true that after the court in *Bruno* held the defendant was entitled on his request to an instruction of

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(Continued)

(1921). The *Russell* opinion stated in substance that to give such an instruction "may constitute reversible error" if proper objection is interposed but went on to hold that in the absence of timely objection and a proper record for review on appeal, the error "was not of such fundamental character as to require reversal." All of the Oklahoma cases were concerned with their own statute, which was very similar to the federal statute involved in *Bruno* v. *United States.* None of the cases was concerned with any claim that the giving of such an instruction violates a defendant's Fifth Amendment rights against self-incrimination.

[6] No mention of *Griffin* is made in either the majority opinion in *Gainey,* decided March 1, 1965, or in Justice Douglas' dissent, although *Griffin,* decided April 28, 1965, is reported in the same volume of United States Reports as is *Gainey,* and the members of the court must have been aware that *Griffin* was under consideration by the court when *Gainey* was decided. For comment on *Molano's* reliance upon *Gainey,* see the language from *People* v. *Hernandez,* 264 Cal App2d 206, 70 Cal Rptr 330, 334 (1968), quoted later in this opinion. The kind of instruction with which we are concerned in the case at bar was not before the court in *Gainey. Gainey* was concerned with the constitutionality of certain federal statutes creating inferences which might be drawn from certain described conduct and the trial judge's explanation of these inferences and statutes to the jury.

the kind here in controversy and thereby disposed of the issue presented for decision, Justice Frankfurter, the writer of the opinion, by way of dictum, did use some language which, taken out of context, might be argued as supporting Justice Douglas' last-quoted clause. As noted before, the *prosecution had argued upon the* Supreme Court in *Bruno* that the failure to give the requested instruction was not error, because it actually benefits a defendant who fails to take the stand not to have the attention of the jury directed to that fact. The court had answered this contention by pointing out [18] that Congress, by enactment of the statute, had authorized the defendant to choose to have the jury told that failure to take the stand did not create any presumption against him and that the jury was forbidden to weigh that fact against him or to consider it in deliberations in any manner. We believe that it is completely unwarranted to cite *Bruno* as authority for the proposition that defendant may enjoin the trial judge from giving the kind of instruction with which we are here concerned.

Defendant has drawn our attention to some other cases: *People* v. *Horrigan*, 253 Cal App2d 519, 61 Cal Rptr 403 (1967); *United States* v. *Smith*, 392 F2d 302 (4th Cit 1908); *State* v. *White*, 285 A2d 832 (Maine 1972); *Mengarelli* v. *United States Marshal*, 476 F2d 617 (9th Cir 1973); and *State* v. *Kimball*, 176 NW2d 864 (Iowa 1970).

In *Horrigan*, defendant requested and then withdrew the instruction. On appeal he contended the court should have given the instruction *sua sponte*. It was held no error was committed, but for some unknown reason the court (in what defendant here concedes to be dictum) said that the giving of such an instruction *sua sponte* is a constitutionally (presumably Fifth Amendment although not identified) proportioned invasion of, and a violation of, a defendant's [19] rights.

In *Smith, supra*, the trial court refused defendant's requested instruction that the fact he did not take the stand could not be held against him. The appellate court reversed, citing *Bruno* as its authority. Again, by way of what defendant here concedes to be dictum, the court went on to say, without any stated reasons or citation of authority, that such an instruction should not be given over a defendant's objection.

In *White, supra*, the trial court, without objection, gave the instruction. No exception was taken, but defendant urged on appeal (the grounds not being stated in the opinion) it was

error "for the court to bring the defendant's failure to testify to the attention of the jury." Because of defendant's failure to object or except, the appellate court refused to consider the alleged error. Defendant here advises us that the court held that a trial court should so instruct the jury unless the defendant specifically requests that the court not do so. The court "held" no such thing. The court did say that the "practice" of trial judges should be as defendant here states. There was no discussion whatsoever of constitutional grounds.[7]

In *Mengarelli, supra,* the instruction was given. During the course of the charge, the court also instructed the jury on six occasions that the defendant had no burden to call any witnesses or to produce any evidence. No objection was made either before or after the charge. On appeal, the defendant contended that this [20] amounted to a "comment" on his failure to testify in violation of his constitutional rights. Apparently this contention applied to all of the just-described parts of the charge. Defendant here cites the case to us for the proposition that *"in the absence of objection"* [defendant's emphasis] it is not error to give the *"failure to testify"* instruction. What the court did say was, "It is well established in this Circuit that in the absence of objection it is not *plain* error to give the charge in question." [Emphasis added.] 476 F2d at 618.[8]

In *Kimball, supra,* after the court had already decided that reversal and a new trial were required for misconduct of the trial judge on an unrelated matter, the court discussed this issue although no objection to the instruction was made until defendant's motion for a new trial:

> The question now is whether an instruction which tells the jury *no inference* can be drawn from defendant's

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[7] The authority cited for this advice to trial judges was 15 M.R.S.A. § 1415, which is a typical statute making the defendant a competent witness and providing that his failure to testify is not evidence against him. See *Bruno, supra.*

[8] The court cited three earlier cases as authority: *Coleman* v. *United States,* 367 F2d 388 (9th Cir 1966), in which the opinion does not disclose whether or not defendant objected either before or after the instruction was given; *United States* v. *Jones,* 406 F2d 1297 (9th Cir. 1969), in which no prior objection was made, although exception was saved after the charge (the court expressly declining to decide what might be the case were there prior objection); and *United States* v. *Ballard,* 418 F2d 325 (9th Cir 1969), in which there was no objection either before or after the charge. These Ninth Circuit cases are not helpful to us in resolving this issue.

> failure to testify violates the Griffin rule in the absence of a request for such instruction. The cases since Griffin have been gathered in an annotation in 18 A.R.L.3d 1335. An overwhelming majority of the recent cases hold it is not reversible error. [Cf. statement in *Gross* v. *State, supra,* that the annotation shows courts are about evenly divided.]
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> * * * * *
>
> It is not claimed the instruction given is an erroneous statement of the law. It is claimed to be [21] prejudicial because it calls the jury's attention to defendant's failure to take the stand.
>
> * * * * *
>
> We must recognize, however, that the instruction is a comment on defendant's failure to testify even though it is supposedly for defendant's benefit and is designed to keep the jury from speculating on the reasons for his failure to take the stand and drawing improper inferences therefrom. There are those who believe the instruction is more harmful than helpful and regardless of how favorably to the accused the instruction may be worded it may inadvertently cause the jurors to consider certain adverse inferences which could not otherwise have entered their minds.
> (176 NW2d at 868, 869).

As we stated earlier in the opinion, the Court of Appeals acknowledged that there were holdings contrary to the "rule" which the court reached. One of these was *United States* v. *Schwartz,* 398 F2d 464 (7th Cir 1968), *cert den* 393 US 1062 (1969). There the defendant did not testify and presented no witnesses. It is difficult to ascertain the exact state of the record made in the trial court except insofar as the following language from the opinion may shed light:

> * * * It was not reversible error to refuse to allow Schwartz to forego the benefit of Section 3481 of the Criminal Code (18 USC § 3481) insuring his right not to testify.
> (398 F2d at 469–470).

On appeal, the defense contended that the trial court should not have instructed the jury that defendant had an absolute

right not to take the witness stand. Said the appellate court, "Such an instruction is considered to be helpful rather than prejudicial to a defendant." 398 F2d at 469. There is no discussion of constitutionality in *Schwartz*. The court relied upon *United States* v. *Garguilo*, 310 F2d 249 (2nd Cir 1962) and *United States* v. *Kelly*, 349 F2d 720 (2nd Cir 1965), *cert den* 384 US 947 (1966).

[22] In *Garguilo*, the instruction was given *sua sponte*, and the court said that the instruction is considered helpful rather than prejudicial. The court reasoned that the jurors have observed the defendant's failure to take the stand, and in the absence of such an instruction nothing could be more natural than for the jurors to draw an adverse inference from the lack of testimony by the very person who should know the facts best.

In *Kelly, supra*, one co-defendant requested such an instruction, which was given over the objection of two co-defendants. The appellate court (terming these as Fifth Amendment instructions) said:

> * * * we think they are unexceptionable, that, after Schuck's request the trial judge had no alternative other than to give these instructions, and that it would not have been error for him to give them even if Schuck had not made the request.
> (349 F2d at 769)

Bruno, supra, and *Garguilo, supra*, among others, were cited as authority.

Another case cited as contrary to defendant's contention here is *United States* v. *Rimanich*, 422 F2d 817 (7th Cir 1970). Over prior objection the instruction was given. The opinion is silent as to the basis of defendant's objection and his assignment of error on appeal. Remarking that the instruction is thought to be helpful rather than prejudicial, the court found no error, citing *Schwartz, supra*, as authority *See also, United States* v. *Wick*, 416 F2d 61 (7th Cir 1969), *cert den* 396 US 961 (1969), to like effect.

The Court of Appeals noted another "contrary" holding as being found in *United States* v. *Williams*, 521 F2d 950 (DC Cir 1975). Appellant asserted as error the failure of the court to give the [23] instruction which he had originally requested.

His co-defendant had objected. The trial judge proposed giving the instruction in such form as to refer to appellant alone; thereupon, appellant withdrew his request in light of the proposed substitute instruction. No instruction concerning failure to testify was given. The appellate court found that the appellant had not made a proper record below to have standing to assert this claimed error on appeal. By way of what we consider to be dictum, the court noted that under *Bruno, supra,* there was a right to have the instruction given, and went on to say:

> However, there was no similar right of defendants to insist that such an instruction *not* be given. [Their emphasis.]
> (521 F2d at 955)

Also, in dictum, the court stated that it is "well-established" that it is not error for a judge to give the instruction on his own initiative, citing, *inter alia, Schwartz* and *Garguilo, supra*. Nor, went on the opinion, is it error for the judge to do so over the objection of a sole defendant, citing, *inter alia, Wick, supra*. On the other hand, in a footnote, the court opined (521 F2d at 955) that where there are no conflicting wishes of co-defendants the better practice is for the trial judge to respect the tactical decisions of defense counsel. There was *no discussion* of the issue as being on a *constitutional* level.

In its brief in the case at bar, the state directs our attention to some of the cases we have already discussed and to others which are of like holding. The state contends that other courts have held that while the giving of the instruction over the defendant's objection may not be the best practice, the instruction [24] is nevertheless non-prejudicial, citing to us *State* v. *Goldstein*, 65 Wash 2d 901, 400 P2d 368 (1965), *cert den* 382 US 895 (1965): *Pearson* v. *State*, 28 Md App 196, 343 A2d 916 (1975); *Rogers* v. *State*, 486 SW2d 786 (Tex Cr App 1972); *Harvey* v. *State*, 187 So2d 59 (Fla App 1966), *cert den* 386 US 923 (1967).

In *Goldstein* the instruction was given at the state's request. Defendant excepted on the ground that the instruction "was prejudicial." It was held that the instruction given was a correct statement of the law under a 1949 decision of the Washington court, that the law "springs" from the Washington constitu-

tional self-incrimination provision, and that it is not prejudicial whether given at the request of the state or on the court's own motion. There was no discussion of Fifth Amendment rights.

In *Pearson, supra,* the instruction was given over the defendant's prior objection. The opinion recognizes that Fifth and Fourteenth Amendment issues may be involved and, after reviewing some of the authorities to which we have directed attention, concluded:

> On the other hand, we are not prepared to hold, in the absence of showing actual prejudice, that the giving of such an instruction, in correct terms, is violative of the accused's Fifth and Fourteenth Amendment rights, compelling a reversal of the accused's otherwise proper conviction. The rule in *Griffin* v. *California, supra,* directs only that the trial judge refrain from instructing the jury that an accused's failure to take the stand may be the basis for an inference of the accused's guilt.
>
> The accused is, of course, entitled to such an instruction if it is requested by him. "We are not persuaded, however, that the giving of such an instruction by the trial judge *sua sponte,* or at the request of the prosecutor, even over the objection of the accused, constitutes reversible error in the absence of a [25] showing that the accused suffered actual prejudice as the result of such instruction. Whether to give the instruction lies in the sound discretion of the trial judge and, unless an accused can show a clear abuse of that discretion, the action of the trial judge in giving such an instruction will not be disturbed if it is phrased in terms proper and fair to the accused.
>
> In the case at bar, the appellant makes no contention that the instruction itself was improperly phrased and since there has been no showing that the appellant suffered actual prejudice as the result of the instruction, we cannot find that there was an abuse of the trial judge's discretion in giving the instruction, notwithstanding appellant's objection thereto.
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> (343 A2d at 920)

There was a dissent, which adopted the position urged by defendant before us.

In *Rogers, supra,* it is not clearly apparent from the opinion whether there was prior objection. Defendant did except to the

charge, but the grounds are not stated in the opinion. The court refused to reverse but admonished trial judges to omit the instruction when requested by defendant to do so.

The state also directs our attention to *People* v. *Harris*, 52 Mich App 739, 218 NW2d 150 (1974). There the court expressly disapproved dictum from a 1970 Michigan decision, which stated that a defendant should have a choice as to whether the instruction should be given. The court held that the giving of the instruction was mandatory as being an explanation to a jury of laymen of the reason why a defendant may not be called to testify in a criminal case:

> * * * We cannot assume that lay jurors know what lawyers and judges know * * *. [J]urors hear civil and criminal cases. In civil cases, they encounter testimony by all parties as well as testimony by defendants called for cross-examination. It is not reasonable to assume [26] that they will understand why a criminal defendant does not testify without an explanation therefor. (218 NW2d at 151.)

The state cites *State* v. *Dean*, 8 Ariz App 508, 447 P2d 890 (1968) for its comment on *Molano, supra*. In *Dean*, defendant had raised the issue as being of Fifth Amendment cognizance. The instruction was given over his objection. The majority of the court held that it was not error but that it was not well advised. There was a dissent, again adopting the position urged by defendant before us. The Arizona court was of the opinion that *Griffin, supra*, had been misapplied in *Molano*, stating as follows:

> We note that a recent California case has held that an instruction on failure to testify must be given if requested, but if the defendant objects to such an instruction, then to give it becomes a comment upon defendant's failure to testify as forbidden in *Griffin* v. *California*, * * *. At the whim of the accused, an instruction which properly states the law on the subject undergoes a monumental transformation from a procedural safeguard required by the Constitution to a noxious and abhorrent comment forbidden by the very same Constitution. The only basis for this rather startling metamorphosis is the subjective desire of the accused.
>
> * * * * *

> Thus, we feel that the court may never err in giving an instruction on failure to testify, assuming that the contents of the instruction itself are adequate * * *. (447 P2d at 895.)

The Arizona court also noted another California Appellate Division decision as disapproving of *Molano: People* v. *Hernandez*, 264 Cal App2d 206, 70 Cal Rptr 330 (1968).

In *Hernandez* the court noted that *Molano* seemed to be out of step with other California Appellate Division decision, stating in part as follows:

> The next day (August 24, 1967), the court in *People* v. *Molano*, 253 Cal.App.2d 841, 61 Cal [27] Rptr. 821, without mention, discussion or even recognition of California authorities, and relying solely upon a comment of Mr. Justice Douglas in his dissenting opinion in a case dealing not with the instruction in question but involving application of a statutory presumption of guilt where the accused fails to explain his presence at the site of an illegal distillery business (*United States* v. *Gainey*, 380 U.S. 63, 73, 85 S.Ct. 754, 13 L.Ed.2d 658, 674), held it to be error to give CALJIC 51 (1965 Revision) over the expressed objection of defendant because it calls the attention of the jury to the fact of defendant's silence (p. 846, 61 Cal.Rptr. 821). (70 Cal Rptr at 334.)

We believe this to be a fair summation of the *Molano* decision.

A later California case, *People* v. *Brady*, 275 Cal App2d 984, 80 Cal Rptr 418 (1969), is concerned with the same issue. The instruction was given at the prosecutor's request without prior objection from the defendant. The defendant on appeal asserted that this was error on Fifth and Fourteenth Amendment grounds. The *Brady* court recognized that California Appellate Division decisions on the matter are inconsistent and concluded that if the court gives the instruction upon its own volition or at the request of either the prosecution or the defendant, the instruction is proper whether or not there is prior objecion. From our reading of California Appellate Division cases mentioned in *Brady*, we are convinced of only one thing; namely, the decisions on this issue in California are truly inconsistent.

The Hawaii Supreme Court, in *State* v. *Baxter*, 51 Haw 157, 454 Pwd 366 (1969), *cert den* 397 US 955 (1970), also con-

cluded that *Molano* misapplied *Griffin*. After noting that under *Bruno* the instruction must be given when requested, the Hawaii court went on to say:

> We cannot see how an identical instruction will affect a jury differently by the [28] fact that, unbeknown to it, in one case there was an objection and in the other there was not * * * .
> (454 P2d at 367.)

We are called upon for the first time in this court to decide whether the giving of the instruction [9] over prior objection is an invasion of the defendant's Fifth Amendment rights under the self-incrimination clause. We are required to do so without help from the one source which could put the issue to rest; namely, the United States Supreme Court. Despite the diversity of reasoning and results in the state and federal appellate courts, there is no United States Supreme Court decision on this issue. We do not believe the Fifth Amendment, as interpreted and applied in *Griffin, supra*, requires reversal. The reasoning of the Michigan and Hawaii courts described above commends itself to us.

Since most of the cases discussed herein are of fairly recent vintage, it might appear that going back to 1924 for help is something akin to the preparation of oxtail soup; i.e., going pretty far back in search of something good. Nevertheless, we draw attention to an opinion of Learned Hand in *Becher* v. *United States*, 5 F2d 45, (2d Cir 1924), *cert den* 267 US 602 (1925), in which is stated:

> In his charge the learned trial judge without request from the defendants mentioned the fact that they had not taken the stand. With some elaboration he instructed the jury that no inference of guilt could be drawn from this. Becher now urges that any allusion to the fact was reversible error. It is no doubt better if a defendant requests no charge upon the subject, for the trial judge to say nothing about it; but to say that when he does, [29] it is error, carries the doctrine of self-incrimination

[9] Defendant does not contend that the instruction given in this case is a misstatement of the law, and for the purposes of this case we regard it as a proper charge.

> to an absurdity. 5 F. 2d at 49. If we could say it better, we would do so.[10]

We have no quarrel with the portion of the dissent which recognizes the supervisory power of the Court of Appeals and of this court over the administration of justice in the trial courts. We do, however, disagree with its application as a vehicle for deciding this case. In taking the position that defendant's Fifth and Fourteenth Amendment rights were not violated, we make no law which either requires or proscribes any legislative action.

The Court of Appeals was concerned with the trial court's interference with the trial strategy of defendant, and, as we have noted earlier herein, phrased this concern in terms of overriding "the knowledgeable objection of competent defense counsel." The dissent likewise expresses concern over the interference with this trial strategy, stating:

> Unless the trial court has substantial and justifiable doubt of the competency of counsel, the trial court should not interfere with that strategy.

We believe the language in each case may well create more problems that it purports to solve. (See footnote 3 of this opinion.) We believe the language of the dissent may well encourage more interference with trial strategy and place a more difficult burden on the trial judge than does the course we have suggested in footnote 10.

Reversed.

[30] DENECKE, C.J., dissenting.

The majority states the issue to be whether the trial court's instruction violates the defendant's right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments of the Federal Constitution.

I am of the opinion that we should not decide this case on a constitutional issue. I conclude, as did the Court of Appeals, that the trial court's instruction is not proper criminal trial practice and, therefore, the conviction should be reversed.

When the United States Supreme Court holds *for* the defendant in a criminal case, it frequently bases its decision on "the exercise of its supervisory authority over the administra-

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[10] Trial courts are advised, however, that it would be better practice not to give such an instruction unless it is requested by the defendant or, in a case where there are co-defendants, by at least one of them. *Compare, State v. Kimball, supra.*

tion of criminal justice in the federal courts * * *." *McNabb* v. *United States,* 318 US 332, 341, 63 S Ct 608, 87 L Ed 819 (1943). *United States* v. *Hale,* 422 US 171, 95 S Ct 2133, 45 L Ed2d 99 (1975), applied the same principle. As the opinions in these two cases indicate, it follows this procedure although the defendant has argued solely on constitutional issues.

The Oregon Court of Appeals has used this practice; that is, deciding cases on nonconstitutional grounds although constitutional grounds were urged. *Neuhaus* v. *Federico,* 12 Or App 314, 317, 505 P2d 939 (1973).

In my opinion the reason for such a principle is the rigidity of constitutional rulings. If a court declares a practice contrary to the Federal or State Constitutions, the [31] legislative branches cannot effect any change. Change by the people is difficult, particularly if it must be accomplished by amending the Federal Constitution. Courts should be sensitive to barring legislative action when non-constitutional alternative solutions are available.

If a court holds *against* a defendant in a criminal case who is claiming rights under the Federal or State Constitutions, the court must necessarily decide the constitutional issue.

This court has not yet expressly held that we have supervisory power over the administration of justice in the trial courts. The Court of Appeals has expressly recognized it has that power. *State* v. *Gassner,* 6 Or App 452, 459, 488 P2d 822 (1971). This court has repeatedly assumed we have that power. Two examples are *State* v. *Shipley,* 232 Or 354, 360–362, 375 P2d 237 (1962), cert den 374 US 811, 83 S Ct 1701, 10 L Ed2d 1034 (1963), and *State* v. *Marsh,* 260 Or 416, 635–444, 490 P2d 491 (1971).

In *Shipley* we considered whether to adopt the McNabb-Mallory rule. We recognized the rule as one based upon supervisory power over the practice of the trial courts. We refused to adopt the rule, not because of a lack of authority, but because we deemed the rule inadvisable. In *Marsh* we considered the "dynamite" instruction given to juries which appear to be having trouble in reaching a verdict in a criminal case. We held the dynamite instruction given was improper but not reversible error because no exception was taken. We also approved a modified instruction on that general subject. The only basis for our decision could be our supervisory power over the trial courts.

[32] Turning to the merits of the present case, the defense attorney decided his client would be prejudiced if the court instructed that the injury could draw no inferences from the defendant's failure to testify. He so informed the court. The question of whether the defendant was or would be prejudiced by such an instruction is debatable and probably unanswerable. I can think of no reason why the instruction should be given over defendant's objection. I disagree with the trial court that over defendant's objection it was necessary to give it to protect the defendant's right against self-incrimination.

The decision by counsel not to have the instruction given was a decision based on trial strategy. Unless the trial court has substantial and justifiable doubt of the competency of counsel, the trial court should not interfere with that strategy. If counsel's requests made pursuant to such strategy are otherwise not objectionable, the trial court should grant the requests.

I would affirm the decision of the Court of Appeals.

[33] PETITION FOR HEARING

STATE OF OREGON, PETITIONER

v.

ENSIO RUBEN LAKESIDE, RESPONDENT

In the Supreme Court of the State of Oregon

Ensio Ruben Lakeside, Respondent, petitions this Court to reconsider it's decision in *State* v. *Ensio Ruben Lakeside* — Or —, — P2d. — (March 17, 1977), which decision is reprinted as an appendix to this petition.

Point Relied Upon by Petitioner in his Request for Rehearing

On September 14, 1976, the Oregon Supreme Court sent respondent a letter in which it informed respondent that the Court had granted a Petition for Review in his case. The Court also informed respondent that the following questions would be considered by the Supreme Court when the issue was litigated:

> "1) Whether it is reversible error for the trial court to give an instruction, over a criminal defendant's timely objection, that no inference or presumption affecting guilt or innocence arises from that defendant's failure to take the stand during the trial;
> "2) The basis for such a rule."

[34] When respondent submitted his brief to the Court of Appeals respondent phrased the issue presented as follows:

> It was error, and a violation of the Self-Incrimination Clause of the Fifth Amendment to United States Constitution, for the trial Court to comment on Appellant's

> failure to testify, by giving a jury instruction concerning this fact, after Appellant objected to the giving of this instruction.

However, at the time scheduled for oral argument before the Court of Appeals, respondent informed the Court of Appeals that in addition to arguing on the basis set out in his brief, respondent was also arguing that the actions of the trial judge interfered with his right to counsel as set out in the Sixth Amendment to the United States Constitution. Prior to oral argument, respondent had notified the State orally that he intended to present an argument based on the Sixth Amendment in addition to his Fifth Amendment argument.

The Oregon Supreme Court did not require briefs of respondent or petitioner when it considered the case at bar. At oral argument, in response to the second question set out in the Supreme Court's letter of September 14, 1976, "The basis for such a rule.", respondent informed the Court that he was relying on the Sixth Amendment to the United States Constitution as well as the Fifth Amendment. Respondent's counsel argued that respondent was indigent and had had an attorney appointed to represent him so that he, a layman, might have the benefit of the advice of someone trained in the law at his trial. Respondent's counsel argued that the trial court had interfered with respondent's "right to counsel" by interfering with respondent's trial strategy which consisted, [35] in part, of making no mention of the fact that respondent had not taken the stand during his trial.

In this Court's decision, filed on March 17, 1977, neither the majority opinion nor the dissenting opinion discusses respondent's Sixth Amendment argument. Petitioner asks this Court to reconsider it's decision of March 17, 1977, so that it might consider the question of whether or not the trial judge's action interfered with respondent's Sixth Amendment Right to Counsel. This issue was raised during oral argument before the Court of Appeals, but the Court of Appeals did not discuss it in it's opinion. This issue was raised in oral argument before the Oregon Supreme Court, but the Oregon Supreme Court does not mention it in it's decision. It is possible that respondent may request the United States Supreme Court to issue a Writ of Certiorari so that it may decide this issue, which has caused a split among both State and Federal jurisdictions in the United

States. Even if this Court decides not to reverse it's decision in this case, it should at least make mention of the Sixth Amendment argument so that the United States Supreme Court will be apprised of all arguments raised by respondent and this Court's resolution of those arguments.

During oral argument before the Oregon Supreme Court on November 2, 1976, in support of respondent's Sixth Amendment argument, respondent cited this Court to *United States* v. *Ash*, 413 U.S. 305 (1973). Although the issue in *Ash* had nothing to do with the issue raised in this case, the United States Supreme Court did discuss the historical background of the [36] Sixth Amendment. In *Ash*, the United States Supreme Court stated that:

> "A concern of more lasting importance was the recognition and awareness that an unaided layman had little skill in arguing the law or in coping with an intricate procedural system. The function of counsel as a guide to complex legal technicalities long has been recognised by this Court. Mr. Justice Sutherland's well known observations in *Powell* bear repeating here:
>
> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence that is irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense even though the may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty he faces the danger of conviction because he does not know how to establish his innocence." 287 U.S., at 69, 53 S. Ct., at 64.
>
> "The Court frequently has interpreted the Sixth Amendment to assure that the 'guiding hand of counsel' is available to those in need of its assistance * * *." Id., 413 U.S. at 307–308.

Later on the Court stated that:

"* * * Mr. Justice Black, writing for the Court in *Johnson* v. *Zerbst*, 304 U.S. 458, 462–463, 58 S. Ct. 1019, 1022, 82 L. Ed. 1461 (1938), spoke of this equalizing effect of the Sixth Amendment's counsel guarantee:

"It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tri- [37] bunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel."

This historical background suggests that the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." Id., 413 U.S. at 309.

As has been stated, it was respondent's contention that the basis for the rule that it is reversible error for the trial court to give the objected to instruction was the Sixth Amendment to the United States Constitution as well as the Fifth Amendment to the United States Constitution. By interfering with respondent's trial strategy, the trial court interfered with respondent's guarantee that he would have 'Assistance' at trial when he was confronted with both the intricacies of the law and the advocacy of the public prosecutor. This Court should have affirmed the decision of the Oregon Court of Appeals in the above entitled case on the grounds that the decision of the trial court interferes with the Sixth Amendment right to counsel as well as the Fifth Amendment right to be free from self-incrimination.

Again, even if this Court does not change its mind, respondent feels that some mention of his Sixth Amendment argument should be made in the Court's opinion so that the United States Supreme Court will understand the basis for respondent's arguments.

Respectfully submitted,

PHILLIP M. MARGOLIN,
Attorney for Respondent.

[38] STATE OF OREGON, PLAINITFF

v.

ENSIO RUBEN LAKESIDE, DEFENDANT

Denial of Petition for Rehearing

Dated April 12, 1977

The Supreme Court has today denied respondent's Petition for Rehearing in the above-entitled matter.

[39] STATE OF OREGON, PETITIONER,

v.

ENSIO RUBEN LAKESIDE, RESPONDENT.

Judgment and Mandate

Entered March 17, 1977

This cause having come on to be heard on petition for review from the Court of Appeals and having been duly submitted and considered, the court finds there is error as alleged.

IT IS THEREFORE ORDERED and ADJUDGED that the decision of the Court of Appeals is reversed and the cause remanded to said court for entry of an order in accordance herewith.

[40] SUPREME COURT OF THE UNITED STATES

No. 76-6942

ENSIO RUBÉN LAKESIDE, PETITIONER

v.

OREGON

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Oregon.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

OCTOBER 11, 1977.

U.S. GOVERNMENT PRINTING OFFICE: 1977

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-6942

ENSIO RUBEN LAKESIDE,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the
State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The petition for certiorari herein omits the unofficial (Pacific Reporter) citation to the opinion of the Oregon Supreme Court in this case. It is 561 P.2d 612 (1977).

JURISDICTION

The decision of the Oregon Supreme Court in this matter was filed on March 17, 1977. A timely petition for rehearing was denied on April 12, 1977, and the petition for certiorari was filed within 90 days of the latter date, on June 17, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Does the giving of a jury instruction in a criminal case, over the defendant's objection, that no inference may be drawn from the fact that the defendant did not testify violate either the privilege against self-incrimination guaranteed by the Fifth

Amendment or the right to assistance of counsel guaranteed by the Sixth Amendment?

N.B. For the reasons set forth below, respondent does not concede that petitioner's Sixth Amendment claim is properly raised and preserved.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's statement of the constitutional provisions involved in this case is accepted, with the qualification that respondent does not concede that petitioner's Sixth Amendment claim in properly raised and preserved, for the reasons set forth below.

STATEMENT OF THE CASE

Respondent supplements petitioner's "Statement of Facts" as follows.

In petitioner's trial for Escape in the Second Degree, the trial court instructed the jury that no inference was to be drawn from the fact that defendant did not testify in his own behalf, using the language set forth at page 4 of the petition for certiorari herein. Defendant excepted to the giving of this instruction as follows:

> THE COURT: . . . Does the defendant have any further exceptions?
>
> [DEFENSE COUNSEL]: Yes, I have one exception.
>
> I made this in Chambers prior to the closing statement. I told the Court that I did not want an instruction to the effect that the defendant doesn't have to take the stand, because I felt that that's like waving a red flag in front of the jury, so I do have an exception to the instruction given to the effect that the defendant doesn't have to take the stand, and that that should not be considered against him.
>
> THE COURT: The defendant did orally request the Court just prior to instructing that the Court not give the usual instruction to the effect that there are no inferences to be drawn against the

> defendant for failing to take the stand in his own behalf.
>
> The Court felt that it was necessary to give that instruction in order to properly protect the defendant, and therefore the defendant may have his exception. (Tr. 235).

Petitioner's brief in the Oregon Court of Appeals argued only that the giving of the instruction in question violated his Fifth Amendment right against self-incrimination, as is apparent from the manner in which he stated the question presented on appeal.

> Did the trial court violate appellant's rights, guaranteed by the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution, by instructing the jury concerning appellant's failure to testify, when appellant objected to the giving of this instruction prior to the charge to the jury? (Appellant's Brief, at 1).

As petitioner acknowledged in his petition for rehearing in the Oregon Supreme Court, he first attempted to inject a Sixth Amendment claim into this case during oral argument in the Court of Appeals (Petition for Rehearing, at 2). Neither the opinion of the Court of Appeals nor the opinion of the Oregon Supreme Court discusses that claim, as petitioner complained in his petition for rehearing (Id., at 2-3)

REASONS FOR DENYING THE WRIT

I. Petitioner's Fifth Amendment Claim Is Not Substantial Enough To Warrant Review.

It is true, as the petition for certiorari herein points out, that there is a division of authority on the question of whether the giving, over objection, of an instruction that no inference is to be drawn from the fact that the defendant in a criminal case has not testified in his own behalf violates the privilege against self-incrimination, although it appears that the majority of jurisdictions which have considered the question hold, like Oregon, that it does not. See Anno., "Accused's Failure To Testify --

Charge," 18 A.L.R.3d 1335 (1968). If the mere fact that the jurisdictions of this country are divided over the question were sufficient to create a question substantial enough to warrant resolution by this Court, the present case would seem to be a satisfactory one in which to resolve it. We submit, however, that the result reached by the Oregon Supreme Court is clearly the correct one and that, rather than disturbing that result, this Court should postpone its consideration of the question until it is confronted with a case holding to the contrary.

In essence, petitioner is asking this Court to extend its holding in Griffin v. California, 380 U.S. 609 (1965), and to say that the Fifth Amendment not only prohibits argument by the prosecution and instructions by the trial court which invite the jury to draw inferences adverse to a criminal defendant who does not testify, but also prohibits any reference to the fact that the defendant did not testify, even when the reference is in a context intended to prevent the jury from drawing such inferences. Such a holding would be tantamount to a holding that a jury which is cautioned to draw no inference from the fact that the defendant does not testify is not capable of following such an instruction, but cf. Frazier v. Cupp, 394 U.S. 731, 736 (1969), or at least, to a holding that the defendant has a constitutional right to gamble that a jury which is not cautioned to avoid drawing adverse inference from defendant's silence will be less likely to do so than one which is. Neither holding, we submit, is sound law, and this Court should not declare either to be the law.

II. Petitioner's Sixth Amendment Claim Is Neither Properly Raised Nor Substantial Enough To Warrant Review.

Alternatively, petitioner claims that the giving of the instruction that no inference may be drawn from the fact that he did not testify, over the objection of his attorney, constitutes

a denial of his Sixth Amendment right to the assistance of counsel (Petition, at 8-10). As pointed out in our Statement of the Case, above, petitioner first attempted to raise this claim on oral argument in the Oregon Court of Appeals and neither of the Oregon appellate courts addressed it. For this reason, we do not concede that petitioner's Sixth Amendment claim is properly before this Court. Assuming, arguendo, that it is, the claim is without merit.

The gist of petitioner's Sixth Amendment argument seems to be that any trial court ruling which interferes with defense counsel's tactics or strategy deprives an accused of the effective assistance of counsel, at least to the extent of that interference and to the extent that the interference is erroneous. This reasoning would make a Sixth Amendment issue of every trial court ruling adverse to every defendant represented by counsel in a criminal case. It is not surprising that neither of the Oregon appellate courts dignified this contention with a response, if they did regard it as properly before them. Nor is it surprising that none of the cases cited in the petition for certiorari offers the slightest support for it.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES A. REDDEN
Attorney General of Oregon
AL J. LAUE
Solicitor General
THOMAS H. DENNEY
Assistant Attorney General

Counsel for Respondent

September 12, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6942

ENSIO RUBEN LAKESIDE,

Petitioner,

v.

OREGON,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF OREGON

BRIEF OF PETITIONER

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ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF OREGON

BRIEF OF PETITIONER

CITATION TO OPINION BELOW

Petitioner was charged with Escape in the Second Degree, Oregon Revised Statutes, 162.155. Petitioner was tried on September 25 and 26, 1975, and was found guilty by a jury. He was sentenced on October 1, 1975. Petitioner appealed the judgment of the trial court to the Oregon Court of Appeals.

The Oregon Court of Appeals reversed petitioner's conviction in *State of Oregon v. Ensio Ruben Lakeside*, 25 Or. App. 539, 549 P.2d 1287 (1976). The State of Oregon petitioned the Oregon Supreme Court for review of the opinion of the Court of Appeals and review was granted.

The Oregon Supreme Court reinstated petitioner's conviction and reversed the decision of the Oregon Court of Appeals, with one Justice dissenting, *State of Oregon v. Ensio Ruben Lakeside*, 277 Or. 569, 561 P.2d 612 (1977). On April 12, 1977, a petition for rehearing was denied without opinion.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

QUESTION PRESENTED

Is it a violation of the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution and a violation of a defendant's Right to Counsel, guaranteed by the Sixth Amendment to the United States Constitution, for a trial court to comment on a defendant's failure to testify at his trial, by giving a jury instruction concerning this fact, after a defendant has made a timely objection to the giving of this instruction prior to the charge to the jury?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved in this petition are the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

> Amendment V. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of his life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."
>
> Amendment VI. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."
>
> Amendment XIV. "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due

process of law; nor deny to any person within its jurisdiction equal protection of the laws . . ."

STATEMENT OF FACTS

Petitioner was charged with Escape in the Second Degree, ORS 162.155. Petitioner stood trial on September 25 and 26, 1975. As part of his trial strategy, petitioner did not take the stand, and petitioner's counsel was careful to avoid any mention of this fact in voir dire or opening and closing arguments.

Prior to instructing the jury, the trial court met with counsel in chambers. At that time the trial court informed counsel that it intended to give the following instruction:

> "Under the laws of this State, a defendant has the option to take the witness stand to testify in his or her own behalf. If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption against the defendant, and this must not be considered by you in determining the question or guilt or innocence."

Petitioner's counsel informed the Court that he did not want the instruction read to the jury. The trial court gave the instruction to the jury despite this timely objection. [Tr. 231] Following the charge to the jury the following took place:

> "THE COURT: Motion for mistrial will be denied.
>
> "Does the defendant have any further exceptions?
>
> "MR. MARGOLIN: Yes, I have one exception.

"I made this in chambers prior to the closing statement. I told the Court that I did not want an instruction to the effect that the defendant doesn't have to take the stand, because I felt that that's like waving a red flag in front of the jury, so I do have an exception to the instruction given to the effect that the defendant doesn't have to take the stand, and that that should not be considered against him.

"THE COURT: The defendant did orally request the Court just prior to instructing that the Court not give the usual instruction to the effect that there are no inferences to be drawn against the defendant for failing to take the stand in his own behalf.

"The Court felt that it was necessary to give that instruction in order to properly protect the defendant, therefore, the defendant may have his exception." [Tr. 235]

Petitioner was convicted and appealed his case to the Oregon Court of Appeals which reversed his conviction on June 1, 1976. The Oregon Supreme Court took review and reversed the Oregon Court of Appeals in a decision filed on March 17, 1977. On October 11, 1977, this Court granted petitioner's Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Fifth Amendment to the United States Constitution states that a defendant in a criminal case cannot be compelled to be a witness against himself. This Court has held that it is a violation of this Fifth Amendment right for a prosecutor or trial judge to comment on the

failure of a defendant to testify at his trial if the defendant chooses to exercise his Fifth Amendment privilege. *Griffin v. California*, 380 U.S. 609 (1965).

The Sixth Amendment to the United States Constitution guarantees the assistance of counsel for those on trial for a criminal charge. This Court has long recognized that "the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance." *Gedders v. United States*, 425 U.S. 80, 88 (1976).

One of the most important decisions a criminal defendant makes is the decision not to testify at his trial. In the case at bar, petitioner, an indigent layman, was appointed counsel to advise him, among other things, whether or not to take the stand in his defense. It was decided that petitioner would not testify and no comment was made concerning this fact in voir dire, opening argument or closing argument so as not to call attention to petitioner's failure to testify.

Every criminal case has a different set of facts. The trial judge sees these facts in the sterile atmosphere of the courtroom. Defense counsel lives with the case and is privy to information, for instance attorney-client communications, of which the trial judge is never aware. Competent trial counsel is much better equipped to decide trial strategy than a trial judge who enters the case only on the day of trial. When petitioner's counsel asked the trial court not to give the "failure to testify" instruction he was providing the assistance of counsel of which the Sixth Amendment speaks. Petitioner's counsel concluded that giving the "failure to testify" instruction would be "like waving a red flag

in front of the jury" and, as such, would constitute the type of comment on petitioner's failure to testify that is constitutionally prohibited.

When the trial court gave the instruction it interfered with the guidance provided by counsel and it violated petitioner's Right to Counsel guaranteed by the Sixth Amendment to the United States Constitution.

The giving of the instruction constituted a comment on the exercise of petitioner's right to be free from Self-Incrimination and it violated a right guaranteed to petitioner by the Fifth Amendment to the United States Constitution.

ARGUMENT

I.

THE ISSUE

The issue raised by petitioner in this case is very narrow. The issue is whether it is a violation of the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution and the Right to Counsel guaranteed by the Sixth Amendment to the United States Constitution for a trial judge to instruct the jury concerning the failure of a defendant to testify when defense counsel has objected to the giving of this instruction prior to the charge to the jury.

This is not a case where no objection is made prior to the giving of the "failure to testify" instruction and the Court gives such an instruction *sua sponte*. This is not a case where the Court gives such an instruction *sua*

sponte and objection is made after the instruction is given. This is not a case where one co-defendant asks for the instruction and the other co-defendant objects.

II.

THE TRIAL COURT VIOLATED THE SELF-INCRIMINATION CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT GAVE AN INSTRUCTION TO THE JURY CONCERNING THE PETITIONER'S FAILURE TO TESTIFY AT HIS CRIMINAL TRIAL, AFTER PETITIONER OBJECTED TO THE GIVING OF THIS INSTRUCTION PRIOR TO THE CHARGE TO THE JURY.

The Fifth Amendment to the United States Constitution states that:

> "No person shall be . . . compelled in any criminal case to be a witness against himself . . ."

In *Griffin v. California*, 380 U.S. 609 (1965), the defendant did not testify at trial. The prosecutor commented to the jury on the failure of the defendant to testify. The trial judge instructed the jury that the defendant had a constitutional right not to testify but went on to say that the jury could consider this failure to testify as evidence bearing on the question of whether or not he was guilty of the crime charged. This Court reversed the defendant's conviction holding that the Fifth Amendment to the United States Constitution forbids either comment by the prosecution on the accused's silence or instructions by the Court that such silence is evidence of guilt.

Several courts have reached the conclusion, either in a holding or in dicta, that it is error for a court to instruct a jury concerning the failure of a defendant to testify when defense counsel has made a timely objection to the giving of the instruction. In *People v. Molano*, 253 Cal. App. 2d 841, 61 Cal. Rptr. (1967), an instruction identical in content to the instruction given in the case at bar was read to the jury over objection of defense counsel. The California Court of Appeals, Second District, Division Four held that:

> "Since *Griffin v. State of California*, (Apr. 1965) 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106, either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt, are forbidden. Defendant contends, and we believe correctly so, that to give this instruction when he did not want it to be given was tantamount to making a 'comment' proscribed by *Griffin*. The argument being that such an instruction highlights and emphasizes the fact that the accused did not take the stand.
>
> "Particularly apt here, we believe, is the comment of Mr. Justice Douglas in his dissenting opinion in *United States v. Gainey*, (Mar. 1965) 380 U.S. 63, 73 . . .
>
> > 'Just as it is important for counsel to argue from the defendant's silence, *so is it improper for the trial judge to call attention to the fact of defendant's silence.* Indeed, under 18 U.S.C. Section 3481, the defendant is entitled as a matter of law to have the trial judge expressly tell the jury that it must not attach any importance to the defendant's failure to testify; *or if the defendant sees fit, he may choose to have no mention made of his silence by anyone.*

> *Bruno v. United States*, 308 U.S. 287, 60 S. Ct. 198, 84 L. Ed. 257' [Emphasis added]" Id., 61 Cal. Rptr. at 824-825.

In *Gross v. State*, 306 N.E.2d 371 (1974) the Indiana Supreme Court reversed an armed robbery conviction when the trial court gave the "failure to testify" instruction over objection of defense counsel. That court held:

> "The decision to remain silent is an often used trial tactic. For one reason or another, the accused and his counsel decide that the accused's interests will best be served by exercising Fifth Amendment prerogatives. In order for the privilege to be fully utilized, it is essential that no aspersion whatsoever be cast upon the accused for his failure to testify. Thus, it is necessary to closely regulate all judicial (as well as prosecution) statements regarding the accused's silence.
>
> "We do not believe that all such judicial comments are violative of Fifth Amendment rights. However, we do believe that the accused should *request* any instruction which requires the jury not to draw negative inferences from an accused's silence or *consent* (either expressly or impliedly) to the giving of the instruction. If, as a trial tactic, the defense determines that such an instruction would assist its case, he may request the judge to so instruct. Furthermore if the judge *sua sponte* offers to give the instruction, and the defense fails to object, the defense will be deemed to have consented to its submission. However, if the judge states his intentions to submit the instruction and the defense *does* object, the giving of the ir truction constitutes an invasion of Fifth Amendment rights and judicial error." Id., at 372-373

In *State v. Kimball*, 176 N.W.2d 864 (1970) the Iowa Supreme Court reversed for reasons unrelated to this appeal. However, the court did discuss the issue raised here.

> "It is not claimed the instruction given is an erroneous statement of the law. It is claimed to be prejudicial because it calls the jury's attention to defendant's failure to take the stand.
>
> * * *
>
> "We must recognize, however, that the instruction is a comment on defendant's failure to testify even though it is supposedly for defendant's benefit and is designed to keep the jury from speculating on the reasons for his failure to take the stand and drawing improper inferences therefrom. There are those who believe the instruction is more harmful than helpful and regardless of how favorably to the accused the instruction may be worded it may inadvertently cause the jurors to consider certain adverse inferences which would not otherwise have entered their minds.
>
> "Because of the divergent opinions in this sensitive area and as the giving of even a cautionary instruction favorable to defendant may violate the spirit of Griffin v. State of California, supra., we believe it is advisable for us to take a definitive position on this issue. We now hold that such instruction should not be given in any future trial unless it is requested by defendant, and that it would be considered error if it is given, absent such request, in any trial started after the date this opinion is filed." Id., at 869.

Other cases have held, without discussing the Fifth Amendment, that it is reversible error for a court to give the instruction over objection: *People v. Hampton*,

394 Mich. 437, 321 N.W.2d 655 (1975); *Russell v. State*, 240 Ark. 97, 398 S.W.2d 213 (1966); *Villines v. State*, 492 P.2d 343 (Okla. Ct. of Crim. Appeals 1971).

See also, *State v. White*, 285 A.2d 832 (Me. 1972); *United States v. Smith*, 392 F.2d 302 (CA 4, 1968); *Mengarelli v. United States Marshall*, 476 F.2d 617 (CA 9, 1973); *People v. Horrigan*, 253 Cal. App. 2d 519, 61 Cal. Rptr. 403 (Ct. of App., 4th Dist., Division 2, 1967).

Under Federal law, *Bruno v. United States*, 308 U.S. 287 (1959) and the law of the State of Oregon, *State v. Hale*, 22 Or. App. 144, 537 P.2d 1173 (1975) a defendant has an absolute right to have the "failure to testify" instruction given if he requests it. Several courts which have held contrary to petitioner's position have done so under the mistaken belief that the instruction is always helpful rather than prejudicial to a defendant, *United States v. Schwartz*, 398 F.2d 464, 469 (CA 7, 1968) *cert. den.* 393 U.S. 1062 (1969); *United States v. Rimanich*, 422 F.2d 817, 818 (CA 7, 1970); *United States v. McGann*, 431 F.2d 1104, 1109 (CA 5, 1970), or because the court "cannot see how an identical instruction will affect the jury differently by the fact that unbeknown to it, in one case there was an objection and in the other there was not", *State v. Baxter*, 51 Haw. 57, 454 P.2d 366, 367 (1969).

The wording of the instruction is not at issue here. Prejudice arises when the instruction is read in a situation where it should not be read, thus calling attention to the fact that defendant has stood mute. Each criminal case has a different set of facts. Under certain circumstances it is advantageous to have the trial court instruct the jury concerning the defendant's

failure to testify. If the defendant can not take the stand for some reason and there is evidence in the trial that can only be explained by the defendant, then defense counsel would want to have a "failure to testify" instruction given to the jury in hopes that they will not hold the defendant's failure to testify against him.

Under other circumstances, it is extremely disadvantageous to have a "failure to testify" instruction given. Suppose that defendant puts on an alibi defense and produces several witnesses to testify that the defendant was at some place other than at the scene of the crime at the time that the crime was committed. Furthermore, assume that the defendant has a lengthy criminal record, including convictions for the crime charged, and makes a bad appearance on the stand. Since the defendant would add nothing to the testimony of the alibi witnesses and would injure his cause by taking the stand, trial strategy dictates that defense counsel not put defendant on the stand and try to call as little attention as possible to defendant's failure to take the stand. If the defend[illegible] witnesses supply all the information that the defendant would supply had he taken the stand, the jury will probably not think too much of the defendant's failure to take the stand. Under such circumstances, a defense counsel would not want to have the failure of the defendant to take the stand highlighted by the giving of an instruction concerning this fact. Instructing the jury under these circumstances amounts to waving a red flag in front of the jury concerning the fact that the defendant has failed to give his side of the story.

The giving of an identically worded "failure to testify" instruction can be harmful or helpful depending on the facts of the individual case. Defense counsel, if competent, is the best person to determine when the instruction would be helpful and when it would be prejudicial. If a judge gives the instruction after objection in a case where giving it would be prejudicial, giving the instruction constitutes a "comment" on the failure of the defendant to testify and is as harmful to a defendant's position as an illegal comment by the prosecutor about this fact.

III.

THE TRIAL COURT VIOLATED THE "ASSISTANCE OF COUNSEL" CLAUSE OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT GAVE AN INSTRUCTION TO THE JURY CONCERNING PETITIONER'S FAILURE TO TESTIFY AT HIS CRIMINAL TRIAL, AFTER PETITIONER OBJECTED TO THE GIVING OF THIS INSTRUCTION PRIOR TO THE CHARGE TO THE JURY.

The Sixth Amendment to the United States Constitution states that:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."
>
> "The decisions of [the United States Supreme Court] have not given to [the constitutional provisions of the Sixth Amendment] a narrow literalistic construction. More specifically, the right

to the Assistance of Counsel has been understood to mean that there can be no restriction upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact finding process that has been constitutionalized in the Sixth and Fourteenth Amendments . . . the right to Assistance of Counsel has thus been given a meaning that ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary fact finding process." *Herring v. New York*, 422 U.S. 853, 857-858 (1975)

In *United States v. Ash*, 413 U.S. 305 (1973), this Court discussed the historical background of the Sixth Amendment:

"A concern of more lasting importance was the recognition and awareness that an unaided layman had little skill in arguing the law or coping with an intricate procedural system. The function of counsel as a guide through complex legal technicalities long has been recognized by this court. Mr. Justice Sutherland's well-known observations in [Powell v. Alabama, 287 U.S. 45 (1932)] bear repeating here:

'Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every

> step of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.' 287 U.S., at 69.
>
> "The Court frequently has interpreted the Sixth Amendment to assure that the 'guiding hand of counsel' is available to those in need of its assistance . . .' " Id., at 307-308

Later on this Court stated that:

> ". . . Mr. Justice Black, writing for the Court in *Johnson v. Zerbst*, 304 U.S. 458, 462-463 (1938), spoke of this equalizing effect of the Sixth Amendment's counsel guarantee:
>
> > 'It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.'
>
> "This historical background suggests that the core purpose of the counsel guarantee is to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." Id., at 309

Petitioner, an indigent layman, had to have counsel appointed so that he might have the benefit of the advice of someone trained in the law at his trial. One of the most important decisions a criminal defendant makes is the decision not to testify at his trial. Petitioner, with the help of his counsel, decided that it would be adverse to his interests to testify at his trial. As part of his trial strategy, no comment was made concerning petitioner's failure to take the stand in voir

dire and opening or closing arguments so as not to highlight this fact.

Every criminal case has a different set of facts. A trial judge sees these facts in the sterile atmosphere of the courtroom. Defense counsel lives with a case and is privy to information, for instance attorney-client communications, of which the trial judge is never aware. Competent trial counsel is much better equipped to decide trial strategy than a trial judge who enters the case for the first time on the day set for trial. When the trial court gave the objected to instruction, it called attention to the fact that petitioner had not testified and destroyed all of the possible benefits that might have enured to petitioner because of his trial strategy. Additionally, had petitioner's counsel known that the trial court was going to "comment" on his client's failure to testify, he might have changed his strategy and voir dired the jury on the effect that petitioner's not testifying would have on its deliberation. He might also have commented on this fact in his opening and closing statements.

In *Brooks v. Tennessee*, 406 U.S. 605 (1972) this Court held that a Tennessee statute that required a defendant in a criminal case to testify before any other witness for the defense if he was to testify at all was unconstitutional because it restricted the right of counsel to decide whether, and when, the accused should take the stand during his trial. In arriving at that decision, this Court stated:

> "Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right. By requiring the accused and his lawyer to make that choice without an

> opportunity to evaluate the actual worth of their evidence, the statute restricts the defense – particularly counsel – in the planning of its case. Furthermore, the penalty for not testifying first is to keep the defendant off the stand entirely, even though as a matter of professional judgment his lawyer might want to call him later in the trial. The accused is thereby deprived of the 'guiding hand of counsel' in the timing of this critical element of his defense. While nothing we say here otherwise curtails in any way the ordinary power of a trial judge to set the order of proof, the accused and his counsel may not be restricted in deciding whether, and when in the course of presenting his defense, the accused should take the stand." Id., at 612-614

In the case at bar, we are dealing with another important tactical decision concerning the same constitutional right discussed in *Brooks.* In *Brooks,* the question was when or whether the defendant should testify. In this case, the question for counsel is, once a defendant has decided to exercise the right not to testify, how best to deal with the jury concerning this fact. In *Brooks,* this court decided that trial judges ordinarily have the power to set the order of proof but, because an important constitutional consideration was present, the trial judge did not have the power to interfere with a trial strategy decision concerning whether or when the defendant would take the stand. In the case at bar, because of the constitutional considerations involved, this Court should hold that the trial judges power to decide how to instruct the jury should not extend to situations where a defendant and his attorney have decided, as a matter of strategy, that no instruction concerning the defendant's exercise of

his Fifth Amendment constitutional right not to testify should be given.

In *Gedders v. United States*, 425 U.S. 80 (1976) this Court concluded that a trial court's order directing a defendant not to consult with his attorney during a regular overnight recess, called while the defendant was on the stand as a witness and shortly before cross-examination was to begin, deprived the defendant of the assistance of counsel guaranteed him by the Sixth Amendment. In its opinion, this Court said:

> "The judge's power to control the progress and, within the limits of the adversary system, the shape of the trial includes broad power to sequester witnesses before, during and after their testimony . . ." Id., at 87

However, this Court concluded:

> "But the petitioner was not simply a witness; he was also the defendant . . .
>
> "The recess at issue was only one of many called during a trial that continued over ten calendar days. But it was an overnight recess, seventeen hours long. It is common practice during such recesses for an accused and counsel to discuss events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with

the trial process without a lawyer's guidance." Id., at 88-89

"... To the extent that conflicts remain between the defendant's right to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper 'coaching,' the conflict must, under the Sixth Amendment be resolved in favor of the right to the assistance and guidance of counsel. Brooks v. Tennessee, 406 U.S. 605 (1972)" Id., at 91

In *Brooks*, this Court held that there are limits on the trial judge's ordinary power to control the order of proof. In *Gedders*, this Court held that there are limits on the trial judge's ordinary power to sequester witnesses. The factor in *Gedders*, and one of the factors in *Brooks*, that led to this Court's decision in those cases was the existence of a situation where the exercise of the ordinary powers of the trial court interfered with a defendant's Sixth Amendment right to have the assistance of counsel in plotting trial strategy.

It would make no sense for this Court to hold in *Gedders* that the right to consult with counsel is so important that a conviction must be reversed to preserve it and then rule in the case at bar that after the constitutionally protected consultation has occurred, a trial judge is free to interfere with the strategy arrived at when there is no legal basis for doing so and when the strategy concerns something as important as the exercise of the Fifth Amendment protection against Self-Incrimination.

IV.

CONCLUSION

For all the following reasons, petitioner asks the Court to reverse petitioner's conviction.

Respectfully submitted,

PHILLIP M. MARGOLIN
Attorney for Petitioner

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6942

ENSIO RUBEN LAKESIDE,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENT

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No. 76-6942

ENSIO RUBEN LAKESIDE,

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v.

STATE OF OREGON,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENT

OPINIONS BELOW

Petitioner's statement is accepted.

JURISDICTION

Petitioner's statement is accepted.

QUESTION PRESENTED

Does the giving of a jury instruction in a criminal case, over the defendant's objection, that no inference may be drawn from the fact that the defendant did not testify violate either the privilege against self-incrimination guaranteed by the Fifth Amendment or the right to assistance of counsel guaranteed by the Sixth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's statement is accepted.

STATEMENT OF FACTS

Petitioner's statement of facts is accepted.

SUMMARY OF ARGUMENT

This Court has previously indicated, in *Bruno v. United States,* 308 U.S. 287 (1939), that the giving of a jury instruction that no inference is to be drawn from the fact that the accused in a criminal case did not testify does not violate the privilege against self-incrimination, and that whether or not such an instruction shall be given is not a question of Constitutional dimensions. Nothing in *Griffin v. California,* 380 U.S. 609 (1965), suggests otherwise, and this Court should so hold expressly. To hold otherwise suggests an unwarranted lack of faith in the jury's ability to draw no inference from the accused's silence and unnecessarily diminishes the function of the trial judge, by removing from him, and giving to the accused, the right to determine how the jury should be instructed on a particular subject.

Assuming, arguendo, that petitioner's Sixth Amendment claim is properly before the Court, it should be rejected. The accused's Constitutional right to have the assistance of counsel in formulating and exercising his trial strategy does not extend so far as to give him total control over the manner in which the jury is to be instructed concerning the consequences of that strategy, and it should not be so extended here.

ARGUMENT

I

Respondent has relatively little to add to the extensive opinion of the Oregon Supreme Court in this case, rejecting petitioner's claim that the Self-Incrimination Clause of the Fifth Amendment entitles the accused in a criminal case to prevent the trial judge from instructing the jury to draw no inference of guilt or innocence from the fact that the accused did not testify, even though the judge believes the instruction necessary. However, some additional argument may be in order concerning the two previous decisions of this Court which bear most directly on the issue.

In *Bruno v. United States,* 308 U.S. 287 (1939), the Court held that the accused in a federal criminal case is entitled, upon request, to have the jury instructed, in substance, that no inference is to be drawn against him from the fact that he did not testify. While it appears that counsel for Bruno argued that such an instruction was required not only under federal statute, but also under the Fifth Amendment (see 308 U.S. at 288), the Court's opinion seems to be based solely on its construction of the statute (then 28 U.S.C. § 632, now 18 U.S.C. § 3481) making the defendant in a federal criminal case a competent witness in his own behalf. And while the Government argued that such an instruction was properly refused, because if given,

it would have prejudiced Bruno by calling the jury's attention to the fact that he had not testified (see 308 U.S. at 290), the Court, speaking through Mr. Justice Frankfurter, said (a) that the defendant "should be allowed to make his own choice [of whether or not to assume that risk] when an Act of Congress authorizes him to choose" (308 U.S. at 294), and (b) that the Court was not prepared to make

> "a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court that the failure of an accused to be a witness in his own cause 'shall not create any presumption against him.' " (*Id.*).

We note in passing that, unlike the instruction requested in *Bruno,*[1] the instruction given in the present case does not use the word "failure," or any similar verbiage which arguably might suggest that there is a duty on the part of the accused which he has somehow "failed" to discharge. Instead, it speaks of an "option" which the defendant may or may not exercise as he "chooses" (see Pet. Br. 4; App. 4), and thus would appear to be more neutrally worded, and therefore preferable, to the precise instruction considered in *Bruno.*

---

[1] "The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner." 308 U.S. at 292.

More importantly, we submit that, in the context of the present case, *Bruno* suggests, if it does not hold, that (a) the giving of an instruction that no inference is to be drawn from the fact that an accused did not testify cannot be said to infringe upon the privilege against self-incrimination, because it should not be assumed that a jury is incapable of following such an instruction, and (b) the extent to which the accused may have control over whether or not such an instruction shall be given is also not a matter of Constitutional right, but a matter which is subject to regulation, either by the courts of a particular jurisdiction or by a statute thereof, such as present 18 U.S.C. § 3481.

In *Griffin v. California,* 380 U.S. 609 (1965), the Court, speaking through Mr. Justice Douglas, held that

> "the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." 380 U.S. at 615.

The Court expressly noted that it was reserving decision

> "on whether an accused can require, as in *Bruno v. United States,* 308 U.S. 287, that the jury be instructed that his silence must be disregarded." (*Id.* at n. 6).

Necessarily, it would seem, the Court also reserved

decision on the question of whether the accused can, as a matter of Constitutional right, *prevent* such an instruction from being given.

The resolution of petitioner's Fifth Amendment claim in the present case depends, it would seem, upon the breadth to be given to the Court's holding in *Griffin*. If, as some courts have reasoned (we think correctly), *Griffin* holds, in this context, only that the Fifth Amendment prohibits the giving of an instruction which tells the jury that they may infer guilt from the accused's silence, an instruction which tells the jury to draw no such inference is not only proper, but even beneficial to the accused. If, on the other hand, *Griffin* is to be understood broadly, as giving the fullest possible meaning to the accused's privilege against self-incrimination, it can be argued that *Griffin* confers upon the accused the right to decide whether or not any mention should be made, in any context, of his failure to testify. We submit that the latter view is not sound Constitutional doctrine and should not be adopted by this Court. In doing so, we hasten to point out that we are not arguing the wisdom, as a matter of any given jurisdiction's policy, of giving the accused his choice as to whether or not to have the jury instructed that no inference should be drawn from his silence. We are only arguing that such a policy is not mandated by the Constitution.

At bottom, the view that the privilege against self-incrimination confers upon the accused the right to decide whether or not a jury instruction shall be given concerning his failure to testify necessarily rests upon the premise, whether spoken or unspoken, that any instruction which calls the jury's attention to the fact that the accused has not testified, no matter how favorably to him the instruction may be worded, may cause the jury to draw inferences adverse to him, and that the accused in any particular case is therefore entitled, as a matter of Constitutional right, to decide whether the instruction should be given.

This premise should not be adopted. Viewed from one standpoint, it expresses a lack of trust in the jury system that has seldom been acknowledged openly by any court. It assumes that a jury cannot, or will not follow an instruction given to it. The suggestion that such an assumption is applicable to the instruction challenged in this case was, we submit, explicitly rejected by this Court in *Bruno v. United States,* supra, and we submit that the Court should not adopt it now. While this Court has doubted, since *Bruno* was decided, that a jury can follow an instruction to consider certain evidence as bearing on the guilt of one co-defendant, but disregard that evidence as to another,[2] its subsequent decision holding that a jury can follow

[2] *Bruton v. United States,* 391 U.S. 123 (1968).

an instruction that the statements of counsel are not evidence and should therefore be disregarded[3] is more in accord with the basic faith in the jury on which our judicial system rests. A similar holding is in order here.

Viewed from another standpoint, a holding that the Fifth Amendment entitles the defendant or his counsel, and no one else, to decide whether or not the jury should be instructed concerning the accused's failure to testify would remove from the trial judge a portion of his function as a neutral arbiter and give it to one of the two sides contending against each other as adversaries. We submit that diminishing the function of the trial judge is not desirable as a matter of general policy, and that the need for doing so in this specific area has not been demonstrated by petitioner.

II

In addition to his Fifth Amendment claim, petitioner argues that the Right-to-Counsel Clause of the Sixth Amendment guarantees the accused in a criminal case, or his counsel, the right to decide, as a matter of trial strategy, not only whether or not the accused will testify, but also whether or not the jury should be instructed concerning the accused's failure to testify, and that any action taken by the trial judge contrary to the accused's desires on the latter point

[3] *Frazier v. Cupp*, 394 U.S. 731, 735 (1969).

therefore interferes with the accused's Constitutionally protected right to counsel. As petitioner acknowledged in his petition for rehearing in the Oregon Supreme Court (App. 27-28), he did not make this claim in his brief in the state appellate courts, but urged it for the first time on oral argument before the Oregon Court of Appeals. Neither that court nor the Oregon Supreme Court specifically addressed this claim, possibly because of the courts' rules against noticing contentions not fairly raised in the trial court and set forth in the briefs of the parties. *Cf. State v. Hickmann,* 273 Or. 358, 540 P.2d 1406 (1975).[4] For this reason, we do not concede that petitioner's Sixth Amendment claim is properly before this Court. In any event, however, the claim should be rejected.

The gist of petitioner's Sixth Amendment argument seems to be that any trial court ruling which interferes with defense counsel's tactics or strategy deprives the accused of the effective assistance of counsel, to the extent of that interference and to the extent that the interference is erroneous. This reason-

[4]In *Hickmann,* the State appealed from an order suppressing evidence. The court of appeals vacated the order and remanded the case to the trial court for findings of fact concerning whether or not defendant consented to the police entry into his home, a ground not relied upon by the State as a basis for upholding the search in either the trial court or the court of appeals. The supreme court reversed, on the ground that, except where important considerations of public policy may be involved, a case on appeal should be heard on the same theory as that upon which it was presented in the court below.

ing would make a Sixth Amendment issue of every trial court ruling adverse to every defendant represented by counsel in a criminal case.

Such is not the law, and neither of the cases of this Court on which petitioner primarily relies for this proposition supports such a rule. It is one thing to interfere with an accused's right to choose when, and if, to testify, as did the statute struck down in *Brooks v. Tennessee,* 406 U.S. 605 (1972), or with an attorney's right to confer with his client, as did the judge's order condemned in *Gedders v. United States,* 425 U.S. 80 (1976). It is quite another to make the accused or his counsel, rather than the judge, the arbiter of how the consequences of the accused's choice of trial strategy are to be explained to the jury, or otherwise dealt with in the courtroom. The Right-to-Counsel Clause of the Sixth Amendment does not extend to the latter, and should not be so extended under the circumstances of this case.

CONCLUSION

For the above reasons, the judgment of the Supreme Court of the State of Oregon should be affirmed.

Respectively submitted,
JAMES A. REDDEN
Attorney General of Oregon
AL J. LAUE
Solicitor General
THOMAS H. DENNEY
Assistant Attorney General
Counsel for Respondent

December 1977

Will not be printed

FOR ARGUMENT

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1977

No. 76-6942

ENSIO RUBEN LAKESIDE,

Petitioner,

v.

OREGON,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF OREGON

REPLY BRIEF OF PETITIONER

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IN THE SUPREME COURT

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REPLY BRIEF OF PETITIONER

CITATION TO OPINION BELOW

See Petitioner's Opening Brief

JURISDICTION

See Petitioner's Opening Brief

QUESTION PRESENTED

Is it a violation of the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution and a violation of a defendant's Right to Counsel, guaranteed by the Sixth Amendment to the United States Constitution, for a trial court to comment on a defendant's failure to testify at his trial, by giving a jury instruction concerning this fact, after a defendant has made a timely objection to the giving of the instruction

prior to the charge to the jury?

CONSTITUTIONAL PROVISIONS INVOLVED

See Petitioner's Opening Brief

STATEMENT OF FACTS

See Petitioner's Opening Brief

ARGUMENT

Petitioner alleges that the trial court violated the Fifth and Sixth Amendments to the United States Constitution by giving a jury instruction concerning petitioner's failure to testify over objection. On page nine of it's brief, Respondent states:

> "...As petitioner acknowledged in his petition for rehearing in the Oregon Supreme Court (App. 27-28), he did not make this claim in his brief in the state appellate courts, but urged it for the first time on oral argument before the Oregon Court of Appeals. Neither that court nor the Oregon Supreme Court specifically addressed this claim, possibly because of the courts' rules against noticing contentions not fairly raised in the trial court and set forth in the briefs of the parties. Cf. State v. Hickmann, 273 Or 358, 540 P2d 1406 (1975). For this reason, we do not concede that petitioner's Sixth Amendment claim is properly before this Court..."

Petitioner contends that his Sixth Amendment claim is properly before this Court. Petitioner orally notified respondent that he intended to present this argument prior to oral argument in the Oregon Court of Appeals. (App. 28)

The Oregon Court of Appeals obviously considered petitioner's Sixth Amendment claim that the trial court illegally interfered with petitioner's trail strategy by giving the "failure to testify" instruction over objection and, though not specifically mentioning the Sixth Amendment, the "trial strategy" argument

clearly formed the basis for it's decision:

> "...The defendant, however insists that giving the instruction over his objection unjustifiably interfered with his trial strategy, i.e., to avoid mention of his failure to testify.
>
> * * *
>
> "Such a rule allows defense counsel full latitude in matters of trial strategy..." (App. 7)

The Oregon Supreme Court, in granting the respondent's Petition for Review, informed the parties that the Oregon Supreme Court would consider the following questions when the issue was argued before it:

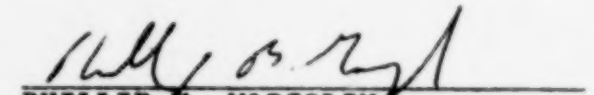
> "1) Whether it is reversible error for the trial court to give an instruction, over a criminal defendant's timely objection, that no inference or presumption affecting guilt or innocence arises from that defendant's failure to take the stand during the trial;
>
> "2) The basis for such a rule." (App. 27)

The Oregon Supreme Court did not limit it's inquiry to the Fifth Amendment, but asked for any basis for a rule requiring reversal if the instruction was given over objection.

CONCLUSION

Petitioner's Sixth Amendment claim is properly before the Court.

Respectfully submitted,



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